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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 626

UNITED STATES OF AMERICA, *ex rel.*, CARTER-SCHNEIDER-NELSON, INC., a corporation,

Appellant,

vs.

JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Appellees.

UNITED STATES OF AMERICA, *ex rel.*, CARTER-SCHNEIDER-NELSON, INC., a corporation,

Appellant,

vs.

JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,

Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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The decision of the Court of Appeals in the case at bar is contrary to the letter and spirit of the statute involved and unnecessarily and narrowly construes that section contrary to the United States Supreme Court's announced decisions that this act is to be liberally construed, thereby denying plaintiff a substantial right and depriving plaintiff of recovery of damages amounting to $33,678.42 13

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JACK T. CAMPBELL, doing business as CAMPBELL CONSTRUCTION AND EQUIPMENT COMPANY, and PHOENIX ASSURANCE COMPANY OF NEW YORK, a corporation,

Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners United States of America, *ex rel.*, Carter-Schneider-Nelson, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 17, 1961 and from the order denying a petition for rehearing entered by the United States Court of Appeals for the Ninth Circuit on October 2, 1961.

Opinion Below.

The opinion of the Court of Appeals is reported at 293 F. 2d 816.

See appendix for full text of decision.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 17, 1961. The order denying the petition for re-hearing was made October 2, 1961. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

Did the court below err in holding that the notices given by use plaintiff were insufficient compliance with the requirements of the Miller Act (40 U. S. C. 270b) to entitle plaintiff to recover against defendants Campbell and the Phoenix Assurance Company of New York?

Did the court below err in allowing recovery against defendant Campbell and the Fidelity and Casualty Company only for the time the equipment was actually used rather than the time it was available for use?

Statutes Involved.

The Miller Act (40 U. S. C. 270(a) through (e) inclusive).

Section 270(b) of 40 U. S. C. provides as follows:

"Section 270(b):

(a) Every person who has furnished labor or material in the prosecution of the work provided for

in such contract, in respect of which a payment bond is furnished under Section 270(a) of this title and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *provided, however*, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety (90) days from the date on which such person did or perform the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage pre-paid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons.